No. 82-2056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF MISSION INDIANS, and THE SECRETARY OF INTERIOR in his capacity as trustee for said Bands,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO VALLEY IRRIGATION DISTRICTS OF THE FLATHEAD IRRIGATION PROJECT, MONTANA, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF THE JOINT BOARD OF CONTROL

The Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts was organized in 1980 by its three constituent Montana irrigation districts ("the Districts"), pursuant to Sections 85-7-1601 *et seq.* of the Montana Code Annotated, to act as operating agent

for the Districts. The Districts include the Indian and non-Indian owners of all lands (other than Indian trust lands) irrigated by the Flathead Irrigation Project ("Irrigation Project") of the Flathead Indian Reservation, Montana ("Reservation").[1]

The Districts were incorporated under Montana law in 1926, in response to the Act of May 10, 1926, 44 Stat. 453, 465, whereby Congress expressly conditioned continued construction of an Irrigation Project power generating facility at the site of the present Kerr Hydroelectric Development of the Montana Power Company (as well as availability of additional federal funds for any Project construction) upon formation of Montana irrigation districts embracing lands irrigable by the Irrigation Project, and execution by such districts of contracts with the United States assuring repayment of reimbursable construction and other Irrigation Project costs to the United States, upon security of a first lien on district lands. The 1926 legislation provided that revenues from the sale of power then in process of development by the Irrigation Project at the Kerr site would be used, first to repay costs of the power development, and then to repay other reimbursable Irrigation Project construction and other costs.

Before execution by the Districts of repayment contracts as contemplated by the 1926 legislation, Congress, by the Act of March 7, 1928, 45 Stat. 200, 212-13, authorized the Federal Power Commission to license the reserved or appropriated power rights of the Irrigation Project then being developed by the Irrigation Project at the Kerr site, to a private company or companies for

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[1] For a survey of the history of the Reservation, the Irrigation Project, and the Districts, *see Confederated Salish & Kootenai Tribes v. United States*, 199 Ct. Cl. 599, 467 F.2d 1315 (1972).

more extensive development, in exchange for benefits for the Irrigation Project satisfactory to the Secretary of the Interior as compensation for the taking of the Irrigation Project's power development rights. The 1928 legislation also provided that a reasonable annual rental should be paid to the Confederated Salish and Kootenai Tribes ("the Reservation Tribes"), for use of tribal lands that would be involved.

In 1930 the Federal Power Commission in fact issued a license (License No. 5) to the Rocky Mountain Power Company, Montana Power Company's predecessor, to develop a large generation facility at the present Kerr hydroelectric site. Consistent with the enabling legislation and at the behest of the Secretary of the Interior, the Commission, by Article 26 of License No. 5, granted certain blocks of low cost electric energy to the Irrigation Project for use for pumping and resale to power customers within the Reservation, as compensation for use by the licensee of the Irrigation Project's prior rights to the Kerr site. *See Montana Power Company* (Project No. 5-003), 23 F.E.R.C. ¶ 61,464 (issued June 30, 1983). The Commission also granted an annual rental to the Tribes for the use of tribal lands.

Pursuant to the Act of May 25, 1948, 62 Stat. 269, revenues from Irrigation Project resale of the low cost energy furnished to the Irrigation Project pursuant to Article 26 of License No. 5 must be employed for reimbursement, first, of Project power distribution system construction costs; then for reimbursement of other Project construction costs including irrigation construction costs; and finally for other Irrigation Project purposes.

The owners of lands irrigated by the Irrigation Project are, as such, the beneficial owners of the Irrigation Project, and of its associated water and power rights, including the right to continue to receive low cost power

from the licensee of the Kerr Development for pumping and for resale to power customers on the Reservation. *See Nevada* v. *United States*, 51 U.S.L.W. 4974, 4977-79 (U.S. June 24, 1983). In addition, pursuant to the Act of May 29, 1908, 35 Stat. 444, 448-50, these landowners will by law ultimately succeed to the management and operation of the Irrigation Project. Accordingly, the Joint Board, as the representative of these landowners, speaks for the beneficial owners and future managers and operators of the Irrigation Project and its associated water and power rights, including the right to continue to receive low cost energy from the present and any future licensee or operator of the Kerr Hydroelectric Development. As such, the Joint Board has a great interest in protecting the Irrigation Project's water and power rights, and in assuring the development of available resources needed to meet increasing demand for water and power on the Reservation.

With a view to protecting the Irrigation Project's and the landowners' interest in the continued availability of low cost power from the licensee of the Kerr Hydroelectric Development, as compensation for use of the Irrigation Project's prior reserved or appropriated development rights, the Joint Board has been granted intervention in FERC proceedings now in process pursuant to Section 15(a) of the Federal Power Act, 16 U.S.C. § 808 (a), looking toward the relicensing of the Kerr Hydroelectric Development. *See Montana Power Company* (Project No. 5-003), 23 F.E.R.C. ¶ 61,464 (issued June 30, 1983), *supra*.[2]

In addition, in order to assure development of needed supplemental supplies of power at other potential hydro-

[2] The original 50-year license for the Kerr Development (License No. 5) expired on May 22, 1980. The Montana Power Company and the Reservation Tribes have filed competing applications for a new license for the Development, and it is anticipated that these applications will be set for hearing in the near future. In the interim, the expired license is, in effect, renewed annually.

electric sites within the Irrigation Project's service area, the Joint Board has filed applications with FERC seeking preliminary permits for low-head hydropower developments at various sites on the Reservation.[3] The Reservation Tribes have intervened in each of these preliminary permit proceedings before FERC. Invoking the very statutes at issue in the instant case—Sections 4(e) and 10(e) of the Federal Power Act, and Section 16 of the Indian Reorganization Act— the Tribes have there asserted that preliminary permits cannot be granted to the Joint Board, or to anyone else, without Tribal consent, and that such consent will not be given .

In the instant case, the majority of the Ninth Circuit panel apparently has held that FERC's authority to license and relicense hydropower projects, pursuant to Sections 4(e) and 15(a) of the Federal Power Act, is not inconsistent with an independent and unreviewable veto power of Indian tribes with respect to use of their reservations in any such projects. In consequence, the majority of the panel concluded that a previously enacted provision of the Mission Indian Relief Act, Act of January 12, 1891, 26 Stat. 712 ("MIRA"), which it interpreted as conferring such a power on the Mission Indians, was not repealed by the enactment of Section 4(e). Judge Anderson, in his concurring and dissenting opinion below, points out that Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1934) ("IRA"), contains a sweeping provision authorizing tribes organized pursuant thereto to prevent sale, disposition, lease, or encumbrance of their lands without tribal consent. Hence, unless the Ninth Circuit panel's decision herein is reversed, it will be arguable that any organized tribe whose lands may now or hereafter be involved in any FERC hydropower

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[3] Lower Crow Creek Project (Project No. 5208-001); Mission Dam Power Project (Project No. 5653-000); Post Creek Power Project (Project No. 5655-000); and Dry Creek Power Project (Project No. 5656-000). *See* 46 Fed. Reg. 61706-08 (December 18, 1981); *id.* 62497-98 (December 24, 1981).

project holds an absolute and unreviewable veto power over continued operation, licensing, or relicensing thereof. Of particular interest to the Joint Board, unless the erroneous decision below is reversed, FERC may feel constrained by the majority holding below to conclude that, regardless of the public interest, it has no alternative other than to deny the Joint Board's low head hydropower applications because of the veto interposed by the Reservation Tribes, which are organized pursuant to IRA. Furthermore, FERC might also feel constrained, again regardless of public interest considerations, either to award the license for the Kerr Development to the Reservation Tribes or to permit the great power resource represented by the Kerr Development to be lost to the country if the Reservation Tribes should decide, for whatever reason, to interpose a veto.

As pointed out in the Petition for Writ of Certiorari at 14, the same situation no doubt exists at many other actual and potential hydropower sites in the West, wherever lands or reserved waters of an organized tribe may be involved.

The Joint Board has manifested its interest in correcting the Ninth Circuit panel majority's error by preparing and tendering to the panel its Brief Amicus Curiae in Support of Petitions for Rehearing or Rehearing En Banc, together with an appropriate motion seeking leave to file the same. Although no party to the case opposed receipt of the amicus brief thus tendered, the panel, by the same divided vote later recorded on rehearing, denied the Joint Board's motion and, by Order filed February 22, 1983, refused to accept the amicus brief. Circuit Judge Anderson, whose concurring and dissenting opinion on rehearing reflects that he was persuaded by the analysis set forth in the amicus brief, dissented and would have received it.

The filing of the instant amicus curiae brief in this Court has been consented to in writing by all parties to No. 82-2056.

ARGUMENT

The decision below is fundamentally inconsistent with the paramount role that Congress, pursuant to the Property Clause (Art. IV, § 3, cl. 2) of the Constitution, has assigned to FERC and its predecessor, the Federal Power Commission, in fashioning national policy with respect to hydroelectric power development on "reservations of the United States." This Court's decisions have consistently recognized the primacy of FERC's role as "the permanent disinterested expert agency of Congress" to fashion and effectuate a cohesive national hydropower policy, *Chapman v. Federal Power Comm'n*, 345 U.S. 153, 168 (1953). Moreover, this Court has firmly rebuffed similar attempted encroachments on FERC's authority. Thus, faithful to the Federal Power Act's overriding purpose to ensure "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation," *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152, 180 (1946), this Court has rejected attempts by state governments, in the purported exercise of their own sovereign powers, to foreclose FERC from exercising the judgment and discretion which Congress has entrusted to it. Such attempts to intrude upon FERC's authority, this Court has warned, would result in a scheme of "divided authority" which "easily could destroy the effectiveness of the Federal Act." *Id.* at 164, 174. *Accord, Federal Power Comm'n v. Oregon*, 349 U.S. 435, 445 (1955).

The Court of Appeals' holding that tribal consent is a condition precedent to the exercise of FERC's congressionally delegated authority to license hydropower sites is directly at odds with the purpose of the Federal Power Act as authoritatively construed by this Court. The seriously divided panel's decision on the issue of tribal consent stands not merely for the proposition that FERC must share its congressionally delegated licensing power with Indian tribes when a portion of a hydropower proj-

ect happens to be located upon tribal lands embraced within Indian reservations. The Court of Appeals has in effect held that Congress intended, in enacting Section 4(e) of the Federal Power Act, to empower an Indian tribe to abrogate and displace the otherwise comprehensive authority of the Commission by the peremptory exercise of a tribal veto which would be unreviewable either by the Commission or by any court of the United States on judicial review.

The decision below would therefore permit individual Indian tribes to set national hydropower policy in a disjointed, patchwork fashion lacking the cohesiveness which Congress wished to ensure when it passed the Federal Power Act. The holding of the Ninth Circuit represents a marked departure from the Act's fundamental premise that FERC acts on behalf of *all* citizens of the United States—including Indians—in setting national hydropower policy and "seeing to it that the interests of all concerned are adequately protected." *Federal Power Comm'n v. Oregon*, *supra* at 449. Indeed, the Ninth Circuit's treatment of the issue of tribal consent reintroduces the fragmented, piecemeal approach to the establishment of hydropower policy that prevailed prior to the enactment of the Federal Water Power Act by hinging water power development on the insular interests of individual tribes and attendant political considerations. *Cf. Chapman v. Federal Power Comm'n*, *supra* at 167 ("local pressures and logrolling" resulting from *ad hoc* congressional action prior to passage of Federal Water Power Act). This Court should grant certiorari and reverse the judgment of the Court of Appeals to vindicate the authority of the Commission as conceived by Congress and to harmonize the decision below with this Court's precedents. The need for corrective action by this Court is particularly acute because the manner in which the Court of Appeals has resolved the issue of tribal consent is likely to affect significantly the development of a "sub-

stantial number of important potential sites for the development of hydroelectric power" in the West and elsewhere, *id.* at 155, and will impede the salutary efforts of the Joint Board and others to develop such power sites. *See* Statement of Interest of Joint Board of Control, *supra* at 4-5; Petition for Writ of Certiorari at 7 and nn. 11 & 12.

The basic flaw of the holding below is the failure by the majority of the panel to perceive, and to give appropriate effect to, the interplay among the definition of "reservations" in Section 3(2) of the Federal Power Act, 16 U.S.C. § 796(2), the annual charges provisions embodied in Section 10(e), *id.* § 803(e), and the non-interference and non-inconsistency findings required of the Commission by Section 4(e), *id.* § 797(e). The Ninth Circuit appears to have misread the requirement that the Commission find that a license will not interfere or be inconsistent with the purpose of the reservation as itself contemplating or requiring Indian consent as a precondition to the issuance of a license.[4] The panel majority accord-

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[4] The Joint Board believes that the divided panel's rather off-hand treatment of this point was premised on Circuit Judge Wright's extraneous *dictum* in *Lac Courte Oreilles Band v. Federal Power Comm'n*, 166 U.S. App. D.C. 245, 257-59, 510 F.2d 198, 210-12 (1975). That *dictum* was unnecessary to the disposition of the case before the Court of Appeals for the District of Columbia Circuit, and was in turn based on Commissioner Moody's dissenting opinion in the same case. *Id.* at 259, 510 F.2d at 212 (MacKinnon, J., concurring and dissenting).

Examination of Commissioner Moody's dissent reveals that his strained interpretation of the non-interference and non-inconsistency finding contemplated by Section 4(e) depends entirely upon an unexplained equation of "the purpose for which [a] reservation was created or acquired" with tribal sovereignty over tribal lands, and his resulting perception of the Indian veto power as an appropriate mechanism for vindication of the overriding purpose of tribal sovereignty. *See Northern States Power Company*, 50 F.P.C. 753, 776-79 (1973) (Moody, Commissioner, dissenting). As Judge MacKinnon noted in his concurring and dissenting opinion in *Lac*

ingly concluded that Section 4(e) did not conflict with Section 8 of the Mission Indian Relief Act, 26 Stat. 712, and thus that the latter statute was not repealed by Section 29 of the Federal Power Act, 16 U.S.C. § 823.

The panel's analysis fails to take account of the expansive scope of the Act's definition of "reservations," which mentions "tribal lands embraced within Indian reservations" as one category of the "lands and interests in lands owned by the United States," *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 112, 114 (1960). Because Indian lands owned by the United States as trustee (as in the case of the Mission Indian reservations) are lands in which the United States has an interest, they clearly are encompassed within the plenary delegation of congressional Property Clause power embodied in Section 4(e) of the Act, subject to the payment to the United States pursuant to Section 10(e) of annual charges "recompensing it [*i.e.*, the United States] for the use, occupancy, and enjoyment of its lands or other property." *See Federal Power Comm'n v. Tuscarora Indian Nation*, *supra* at 114. By holding that the licensing of "tribal lands embraced within Indian reservations" is dependent upon tribal consent, the Court of Appeals has in effect judicially excised one discrete category of federal "reservations" from the licensing power which Congress has delegated to the Commission. This incon-

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Courte, however, this interpretation of Section 4(e) is contrary to the legislative history of the Federal Power Act and "would prevent the use of any lands in a 'reservation' (including tribal lands) in a power project." 166 U.S. App. D.C. at 259, 510 F.2d at 212. In addition, Commissioner Moody's analysis ignores that the real substantive purpose of all reservations, *i.e.*, to provide the Indians with a permanent home, *see Winters v. United States*, 207 U.S. 564, 576 (1908), cannot be interfered with or destroyed by any project in any case, because of the necessity for non-interference and non-inconsistency findings referred to above.

gruous reading of the statute creates two disparate schemes of licensing in which hydropower projects on Indian reservations can be licensed only with tribal concurrence, while the licensing of projects on all other federal "reservations" remains within the prerogative of the Commission, as Congress intended. This interpretation fundamentally disrupts the framework which Congress carefully constructed in Sections 3(2), 4(e) and 10(e) of the Act with respect to the licensing, use and compensation for use of lands or interests in lands in which the United States has an interest, and represents a marked departure from this Court's analysis of the statutory interplay in *Tuscarora Nation*, *supra*.

Judge Anderson's March 17, 1983 opinion concurring and dissenting from the panel majority's denial of the petitions for rehearing sets forth the correct analysis of Section 4(e), its legislative history, and its interrelationship with other provisions of the Federal Power Act. Judge Anderson correctly concluded that the Federal Power Act provides a "direct and specially-tailored scheme for appropriation of Indian lands" and that Sections 3(2), 4(e) and 10(e) of the Act furnished "express congressional authority for acquiring such property" notwithstanding the withholding of tribal consent.[5] 701 F.2d 826,

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[5] Judge Anderson concluded that neither the Mission Indian Relief Act nor Section 16 of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476, provided "the exclusive means for obtaining rights-of-way by FPA licensees." 701 F.2d at 830; Appendix at 38-39. The dissenting Circuit Judge felt constrained to reach the issue of the effect of Section 16 because the San Pasqual Band, one of the bands withholding its consent to the licensing of Project No. 176, had adopted a tribal constitution pursuant to IRA. *Id.* at 829; Appendix at 38. The Joint Board believes that Judge Anderson's analysis is clearly correct, and that Section 16 of IRA cannot properly be read as inconsistent with FERC's authority to license Indian reservation lands pursuant to Section 4(e) of the Federal Power Act. But even if this were not so, and

829, 830; Appendix to Petition for Writ of Certiorari ("Appendix") at 36, 39. The pivotal portions of Circuit Judge Anderson's reasoning—and particularly his analysis, based on this Court's opinion in *Tuscarora Nation*, *supra*, of the parallelism between Sections 4(e) and 10(e) of the Act "in the tribal land sector" and the eminent domain power of Section 21 "in the private land sector," 701 F.2d at 828; Appendix at 36—appear to be based upon arguments which, to the best of the Joint Board's knowledge, were advanced only in its amicus brief which was rejected over Circuit Judge Anderson's dissent. Irrespective of the source of the analysis which dissenting Circuit Judge Anderson found persuasive, the crucial point is that the majority of the divided Ninth Circuit panel, having declined to accept the Joint Board's amicus brief, may not have considered, and in any case did not discuss, the analysis set forth therein before voting to deny rehearing on the Indian veto issue. This circumstance, indicating that the majority may not even have considered the analysis found persuasive by Judge Anderson, argues strongly for the need for most careful review by this Court.

This Court should also grant certiorari to review the Court of Appeals' holding that the conditions which the

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IRA, like MIRA, could arguably be read to restrict the Commission's authority pursuant to Section 4(e), the Joint Board believes that such a reading would be erroneous because in 1935, subsequent to the enactment of IRA, Congress reenacted Section 4(d) of the Federal Water Power Act as Section 4(e) of the Federal Power Act, without in any way changing its language, and without any reference to Section 16 of IRA. Since the language and legislative history of Section 4(d) make it crystal clear that Congress did not intend the Commission's authority to license Indian reservations pursuant to Section 4(d) to be subject to Indian consent, *see* Petition for Writ of Certiorari at 9-10, it is plain that reenactment of Section 4(d) as Section 4(e) of the Federal Power Act worked any required *pro tanto* repeal of Section 16 of IRA, just as enactment of Section 4(d) worked a repeal, if and to the extent necessary, of Section 8 of MIRA.

Secretary of the Interior placed upon the license for Project No. 176 are mandatory upon FERC and that the Commission may not review Interior's determination that such conditions are "necessary for the adequate protection and utilization" of the reservation. 16 U.S.C. § 797(e). The decision below vitiates the preeminent position which Congress intended the Commission to occupy in the field of hydropower development by depriving it of any power to evaluate whether the conditions propounded by the Department of Interior subserve the Federal Power Act's overarching objective, expressed in Section 10(a), that a hydroelectric project be "best adapted to a comprehensive plan . . . for the improvement and utilization of waterpower development." *Id.* § 803(a). This Court should grant certiorari to review the panel's ruling in the interest of the orderly, coherent development of national hydropower policy to delineate with conclusive clarity the respective roles of, and allocation of responsibility between, FERC and the Department of Interior in the licensing of hydropower projects. *See Chapman* v. *Federal Power Commission*, *supra* at 155 (grant of the writ appropriate where "questions of importance" presented which "involve a conflict of view between two agencies of the Government having duties in relation to the development of national water resources").

The parties to the instant case agreed that the Secretary of the Interior's statutory power to propound conditions is limited by a standard of reasonableness; however, the opinion of the majority below contemplates that the Court of Appeals, on judicial review of licenses containing the Department of Interior's conditions, will be the first forum in which the reasonableness of those conditions will be reviewed. 701 F.2d at 827 & 831; Appendix at 32-33, 40-41. The Joint Board believes that this result ill serves the interests of judicial economy, as it requires the Court of Appeals to make a determination with re-

spect to reasonableness from *tabula rasa*, unaided by FERC's expert judgment or its comprehensive perspective concerning hydropower development. Moreover, placing the initial reasonableness decision on FERC is the only resolution of this issue which gives appropriate recognition and deference to the role which Congress assigned to FERC as an independent regulatory commission and which properly "preserve[s] the control of FERC over licensing." 701 F.2d at 831; Appendix at 41.

Finally, it should be noted that the majority's holding that the Secretary's action fixing conditions is unreviewable by FERC is inconsistent with the interpretation which the Court of Appeals for the District of Columbia Circuit has placed upon the cognate provisions of Section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e), concerning secretarial approval of annual charges. In pertinent part, the first proviso of Section 10(e) directs FERC to fix annual charges for the use of Government dams or other structures "subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects." In *Montana Power Company* v. *Federal Power Comm'n*, 148 U.S. App. D.C. 74, 85, 459 F.2d 863, 874, *cert. denied*, 408 U.S. 930 (1972), the Court of Appeals eschewed a reading of Section 10(e) which would confer a conclusive "veto power" on the Secretary. Instead, the court's discussion indicates that the Commission must fix an annual rental after taking into account all pertinent factors including the recommendation of the Secretary of the Interior. The Secretary's only recourse, if dissatisfied, is to seek judicial review of FERC's action: "As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review." *Id.* This Court should grant certiorari in this case to resolve this disparate judicial construction of Sections 4(e) and 10(e) of the Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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